

APR 15 1987

# STATE OF NEW HAMPSHIRE

## INTER-DEPARTMENT COMMUNICATION

DATE April 3, 1987  
AT (OFFICE) Attorney General  
Civil Bureau

FROM Susan Saggiotes Geiger  
Assistant Attorney General

SUBJECT (1) Computer Data-Base Advertising of Real Estate and  
(2) "Homes and Land of Central New Hampshire"

TO Mr. Edward F. Monaghan, Sr.  
Investigator  
Real Estate Commission  
107 Pleasant Street, Johnson Hall  
Concord, New Hampshire 03301

This is in response to your letter of February 23, 1987 in which you posed several questions relative to the above-captioned subjects. In essence, you are inquiring as to whether the publication entitled "Homes and Land of Central New Hampshire" and the computer data-base advertising of real estate described in a letter to your Commission from Attorney Jack Briscoe are subject to the licensing provisions of N.H. RSA 331-A.

For the reasons discussed below, neither Attorney Briscoe's client nor the publishers of "Homes and Land of Central New Hampshire" are subject to the provisions of N.H. RSA 331-A:1 which require the licensure of real estate brokers.

Attorney Jack Briscoe of Philadelphia has indicated to the New Hampshire Real Estate Commission that his client proposed to establish a computer data-base for the purpose of advertising real estate. The client proposes to solicit information from individual sellers of residential property, charge them a one-time, fixed-price registration fee, and then enter the information into a computer data-base. Through an active advertising campaign, the real estate data-base would be made available to prospective buyers, free of charge. The client would have no other contact with either the buyer or seller and would neither "show" the properties nor negotiate any transactions.

"Homes and Land of Central New Hampshire" is a magazine which contains advertisements of real estate. The publication is offered free of charge and the publisher has indicated that it is not a licensed broker and that the magazine "is not an effort to assist in the buying and selling of real estate." "Homes and Land of Central New Hampshire," Vol. 1, No. 6, December, 1986, p. 4.

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You have asked whether Attorney Briscoe's client and the magazine entitled "Homes and Land of Central New Hampshire" come within the definition of a broker and whether Attorney Briscoe's client and the publishers of "Homes and Land of Central New Hampshire" must be licensed. N.H. RSA 331-A:1, II provides the statutory definition of a broker. Under that statute, the term "broker" means:

any person who for a fee, commission or other valuable consideration, or with the intent or expectation of receiving the same, negotiates or attempts to negotiate the listing, sale, purchase, exchange or lease of any real estate or of the improvements thereon, or collects rents or attempts to collect rents, or advertises or holds himself out as engaged in any of the foregoing activities. The term "broker" also includes any person employed by or on behalf of the owner or owners of real estate to conduct the sale, leasing, or other disposition thereof at a salary or for a fee, commission or any other condition; it also includes any person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby he undertakes primarily to promote the sale of real estate through its listing in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both.

N.H. RSA 331-A:1, II (emphasis added). While the underscored portion of the foregoing statute could literally be construed to apply to Attorney Briscoe's client and "Homes and Land of Central New Hampshire," such an application has been held unconstitutional by at least two New England states.

In United Interchange v. Spellacy, 136 A.2d 801, 144 Conn. 647 (1957), the Connecticut Supreme Court ruled on the constitutionality of a portion of Connecticut's statutory definition of "real estate broker"<sup>1</sup> as it applied to a

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<sup>1</sup>The portion of Connecticut's statute which was scrutinized in United Interchange, Inc. v. Spellacy, supra, is nearly identical to the language of RSA 331-A:1, II which is underlined above.

corporation which published a monthly magazine (containing advertisements for the sale, lease or exchange of real estate) entitled "Buyers Digest" and unbound sheets listing prospective real estate sales and exchanges entitled "Brokers Bulletin." Both publications were available free of charge to anyone who requested them; however, the corporation (United Interchange) charged a stipulated fee to parties placing advertisements of their properties in the publications. Like Attorney Briscoe's client and "Homes and Land of Central New Hampshire," United Interchange's primary purpose was to promote real estate sales and exchanges and to refer sales opportunities to licensed real estate brokers and prospective purchasers.

The Connecticut Supreme Court found that Connecticut's statute accurately described United Interchange's business as "promoting 'the sale of real estate through the listing of ... property in a publication issued primarily for such purpose or for referral of information concerning properties to licensed real estate brokers or both.'" Id. at 806. However, the court also found that there was no sound reason for requiring the corporation's representatives to take a written examination on their competency as real estate brokers and salesmen. The court held that the provisions of Connecticut's statutes which embraced United Interchange's activities violated the plaintiff's constitutional rights to equal protection and due process of law and were, therefore, null and void.

The Connecticut Supreme Court stated that in order to pass the test of constitutional validity with respect to "due process" and "equal protection" of the laws, the statute, as applied to United Interchange, must be a proper exercise of the police power of the state. The aforementioned "test" is comprised of two parts: "whether (1) some need for serving the public health, safety or general welfare makes the regulatory legislation necessary or desirable, and (2) the legislation serves that need in a way which is not arbitrary, discriminatory and confiscatory to an unreasonable and unnecessary degree." Id. at 805.

The court found that the only reason advanced for the need of the statute in question was to prevent fraud, "a purpose which has always been considered legitimate for the exercise of the police power when the facts warranted it." Id. at 806. The court further stated that "(a) legitimate purpose, however, cannot justify an unreasonable and unnecessarily arbitrary and discriminatory method of accomplishing it." Id.

The court also noted that "United's business is primarily advertising ... Why then should the officers of United and its salesmen be required to take written examination to establish their competency to carry on the real estate business with all of the detail which that involves?" Id. at 805.

The reasoning employed by the Connecticut Supreme Court in the foregoing case was adopted by the Maine Supreme Judicial Court when it decided the case of United Interchange Inc. of Mass. v. Harding, 145 A.2d 94 (1958). In reviewing a statute and a set of facts which were virtually identical to those presented to the Connecticut Supreme Court in United Interchange v. Spellacy, supra, the Maine Supreme Judicial Court held that the reasoning in Spellacy was "persuasive and compelling." United Interchange, Inc. of Mass. v. Harding, supra, at 97. The Maine court, in deciding Harding, opined that:

It is manifestly unfair to demand that a purveyor of advertising space successfully pass an examination in which he must demonstrate special knowledge of and skill in the real estate business in order that he may continue the business of selling and publishing advertising. Id.

The Maine Supreme Judicial Court also held that the provisions of its statutes pertaining to real estate brokers (provisions which are virtually identical to the above-referenced portions of New Hampshire's and Connecticut's statutes) were unconstitutional as they applied to persons who merely publish advertisements of real estate.

The New Hampshire Supreme Court has not yet decided a case involving the constitutionality of the portion of RSA 313-A:1, II which appears to include real estate "advertisers" within the definition of "broker." However, were the court to be confronted with that issue, the court would undoubtedly adhere to the holdings in the Connecticut and Maine cases because the New Hampshire statute is substantially the same as Maine's and Connecticut's. See Sagendorph v. Marvin, 133 A.2d 49, 101 N.H. 79 (1957).

Thus, I conclude that neither Attorney Briscoe's client nor the publisher of "Homes and Land of Central New Hampshire" are subject to the licensing provisions of N.H. RSA 313-A. In view of the Connecticut and Maine cases cited above, I believe that if the Real Estate Commission were to compel licensure of real estate "advertisers" who do nothing more than publish

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information relating to real estate opportunities, such a licensing requirement would be held unconstitutional.

Please do not hesitate to call me if you have questions about the information presented in this memo or if you have additional questions with respect to either Attorney Briscoe's client or "Homes and Land of Central New Hampshire."

  
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Susan Saggiotes Geiger

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